SUPREME COURT, U.S.
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No. 03-___

IN THE

Supreme Court of the United States

Robert R. Krilich, Sr.,

Petitioner,

v.

United States of America.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the court of appeals err, as the government conceded below, in holding that petitioner's Section 2255 motion challenging his sentencing was a prohibited "second or successive" habeas application because petitioner supposedly could have raised his sentencing challenge in a previously filed challenge to his conviction?

TABLE OF CONTENTS

QUESTION PRESENTED i
TABLE OF CONTENTS ii
TABLE OF AUTHORITIES iii
PETITION FOR A WRIT OF CERTIORARI 1
OPINIONS BELOW AND JURISDICTION 1
RELEVANT STATUTORY PROVISIONS 1
STATEMENT OF FACTS 2
REASONS FOR GRANTING THE WRIT 10

I. The Court Of Appeals Erred In Holding That Petitioner's Section 2255 Motion Was A Prohibited "Second Or Successive" Habeas Application 10

II. The District Court's Ruling That It Had Jurisdiction To Make New Factual Findings Regarding Petitioner's Sentence Nine Months After The Sentence Was Orally Imposed Under Fed. R. Crim. P. 35 Conflicts With The Views Of Other Circuits And Is Incorrect. 15

III. The District Court's Decision That A Jurisdictional Argument Is Subject To The Rules Of Procedural Default Conflicts With The Views Of Other Circuits And Is Incorrect. 19

CONCLUSION 22

TABLE OF AUTHORITIES

Cases

Clay v. *United States*, 123 S. Ct. 1072 (2003) 2, 3, 14
Dahler v. *United States*, 259 F.3d 763 (CA7 2001) ..... passim
Esposito v. *United States*, 135 F.3d 111 (CA2 1997) 11
Harris v. *United States*, 149 F.3d 1304 (CA11 1998) 21
In re Hill, 113 F.3d 181 (CA11 1997) 11
In re Taylor, 171 F.3d 185 (CA4 1999) 11
Kapral v. *United States*, 166 F.3d 565 (CA3 1999) 3, 14
Norris v. *United States*, 687 F.2d 899 (CA7 1982) 8
Prou v. *United States*, 199 F.3d 37 (CA1 1999) 20
Rose v. *Clark*, 478 U.S. 570 (1986) 15
United States v. *Abreu-Cabrera*, 64 F.3d 67 (CA2 1995) 17, 18
United States v. *Aguirre*, 214 F.3d 1122 (CA9), cert. denied, 531 U.S. 970 (2000) 18
United States v. *Barrett*, 178 F.3d 34 (CA1 1999), cert. denied, 528 U.S. 1176 (2000) 11
United States v. *Ceballos*, 302 F.3d 679 (CA7 2002), cert. denied, 123 S. Ct. 925 (2003) 20, 21
United States v. *Clay*, 37 F.3d 338 (CA7 1994) 5, 16
United States v. *De La Torre*, 327 F.3d 605 (CA7 2003) 16, 17, 18
United States v. *Fahm*, 13 F.3d 447 (CA1 1994) 17
United States v. *Gonzalez*, 163 F.3d 255 (CA5 1998) 18
United States v. *Krilich*, 159 F.3d 1020 (CA7 1998), cert. denied, 528 U.S. 810 (1999) 3, 4, 8, 11
United States v. *Krilich*, 257 F.3d 689 (CA7 2001), cert denied, 534 U.S. 1163 (2002) 7, 19
United States v. *Layman*, 116 F.3d 105 (CA4 1997), cert. denied, 522 U.S. 1107 (1998) 17, 18
United States v. *Mooring*, 287 F.3d 725 (CA8), cert. denied, 123 S. Ct. 259 (2002) 21
United States v. *Morillo*, 8 F.3d 864 (CA1 1993) 17

United States v. *Morrison*, 204 F.3d 1091 (CA11 2000) 18
United States v. *Townsend*, 33 F.3d 1230 (CA10 1994) 17, 18
United States v. *Wisch*, 275 F.3d 620 (CA7 2001) 18
United States v. *Wright*, 932 F.2d 868 (CA10 1991) 22
Walker v. *Roth*, 133 F.3d 454 (CA7 1997) 11
Wood v. *Strickland*, 420 U.S. 308 (1975) 15

Statutes

21 U.S.C. 851(a)(1) 20
28 U.S.C. 1254 1
28 U.S.C. 2255 ..... passim

Rules

Federal Rule of Appellate Procedure 4(b) 16
Rule 5, Rules Governing Section 2255 Proceedings, Advisory Committee Note (1997) 3, 14
U.S.S.G. § 2C1.1(b)(2)(A) (1990 ver.) 3
U.S.S.G. § 2C1.1(b)(2)(A) (2003) 5
U.S.S.G. App. C, Amend. 367 5

Other Authorities

Brief for the United States, *Clay* v. *United States*, 123 S. Ct. 1072 (2003) (No. 01-1500) 14
Cert. Reply of the United States as Amicus Curiae, *Yates* v. *Hendon*, No. 02-458 15

PETITION FOR A WRIT OF CERTIORARI

Petitioner Robert R. Krilich, Sr., petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW AND JURISDICTION

The Appendix reproduces the court of appeals' order vacating the judgment of the district court (Pet. App. 1a-2a, 53 Fed. Appx. 787), the district court's order denying petitioner's Section 2255 motion (Pet. App. 3a-5a), the district court's opinion denying petitioner's Rule 35 motion (*id.* 7a-9a), and the district court's opinion resentencing petitioner (*id.* 10a-20a). The court of appeals denied rehearing en banc on April 21, 2003. *Id.* 6a. On July 11, 2003, Justice Stevens extended the time to file this petition to and including August 19, 2003. App. No. 03-44. This Court has jurisdiction under 28 U.S.C. 1254.

RELEVANT STATUTORY PROVISIONS

Title 28, Section 2255 of the United States Code provides, in pertinent part:

> A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of—
>
> (1) the date on which the judgment of conviction becomes final;
>
> * * * * *
>
> A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain—
>
> (1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or

(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

Federal Rule of Criminal Procedure 35 provides, in pertinent part: "(a) Correcting Clear Error. Within 7 days after sentencing, the court may correct a sentence that resulted from arithmetical, technical, or other clear error." At the time relevant to these proceedings, the rule provided in pertinent part: "The court, acting within 7 days after the imposition of sentence, may correct a sentence that was imposed as a result of arithmetical, technical, or other clear error." The Advisory Committee Notes specify that the change was not substantive. See *infra* 16 n.5.

STATEMENT OF FACTS

Petitioner Robert R. Krilich, Sr., filed two Section 2255 motions: in 2000, he challenged his conviction ("the conviction 2255"); in 2002, he challenged his subsequent resentencing ("the resentencing 2255"). As a matter of both fact and law, petitioner could not have included the claims set forth in the resentencing 2255 in his earlier-filed conviction 2255 because those claims did not arise for purposes of Section 2255 review until *after* the district court had already decided the conviction 2255. The court of appeals nonetheless held that the sentencing 2255 was a prohibited "second or successive" habeas application.

1. Rules Governing the Submission of Section 2255 Motions. Congress established in 28 U.S.C. 2255 a procedure for federal prisoners to collaterally attack their convictions and sentences. In order to ensure that courts are not unnecessarily called upon to decide Section 2255 motions, the prisoner must first pursue to their conclusion any challenges he intends to raise on direct appeal. "It is a well-established, longstanding rule that a district court may not ordinarily consider a Section 2255 motion while direct review is still pending." Brief for the United States, *Clay* v. *United States*, 123 S. Ct. 1072 (2003), at 22 (No. 01-1500). See

Kapral v. *United States*, 166 F.3d 565, 572 (CA3 1999) (collecting cases); see also Rule 5, Rules Governing Section 2255 Proceedings, Advisory Committee Note (1997) (Section 2255 motion "is inappropriate if the movant is simultaneously appealing the decision.").

Once a Section 2255 motion becomes ripe upon the conclusion of direct review, prisoners do not have an unlimited time to institute their collateral attack. The Antiterrorism and Effective Death Penalty Act imposes a one-year statute of limitations. 28 U.S.C. 2255 ¶ 6. The one-year period begins to run from the time the challenged proceeding becomes "final" on direct review. *Id.* As this Court recently made clear in *Clay* v. *United States*, when a federal prisoner on direct review seeks certiorari in this Court, "finality" attaches when certiorari is denied. 123 S. Ct. 1072, 1077 n.4 (2003).

2. Petitioner's Conviction and First Sentencing: Petitioner was convicted of racketeering and of making false statements to a bank in connection with industrial bond revenue financing. Under the version of the Sentencing Guidelines in effect at the time of petitioner's conduct, the sentence was calculated based on the amount of the "bribe or the benefit received, or to be received, in return for the bribe." U.S.S.G. § 2C1.1 (b)(2)(A) (1990 ver.). The district court sentenced petitioner to 64 months' imprisonment based on the judge's finding that the benefit to petitioner from his offense conduct was between $5 and $10 million.

Petitioner appealed his convictions and the government appealed the sentence. The court of appeals affirmed petitioner's convictions, but remanded for resentencing on the ground that the district court's calculation of petitioner's gain was too vague. *United States* v. *Krilich*, 159 F.3d 1020, 1031 (CA7 1998) (*Krilich I*).

This Court denied certiorari on October 4, 1999. 528 U.S. 810 (1999). Petitioner had one year from that date – *i.e.*,

until October 4, 2000 – to challenge his conviction under Section 2255. See 28 U.S.C. 2255 ¶ 6.

3. Petitioner's Conviction 2255: Petitioner filed a Section 2255 motion challenging the constitutionality of his conviction on October 3, 2000. At that time, petitioner's resentencing was not subject to collateral attack because direct review of the resentencing had not concluded: not only had the district court not entered a written judgment on the resentencing, but no appeal had been taken, and this Court had not denied certiorari.

Petitioner recognized in his conviction 2255 motion that "claims made pursuant to 28 U.S.C. 2255 should not normally be split and that a petitioner awaiting resentencing should normally wait until the resentencing judgment has become final before attacking the constitutionality of his underlying conviction." Motion Pursuant to 28 U.S.C. § 2255 To Vacate, Set Aside and Correct Sentence at 2 n.1 (Oct. 3, 2000). But petitioner explained that he was filing his conviction 2255 protectively because his deadline to collaterally attack his conviction could be said to expire one year after the conviction became final – *i.e.*, on October 4, 2000 – rather than when all the proceedings in the case became final. Accordingly, petitioner asked that if the district court deemed his first Section 2255 motion "premature" because it did not include challenges to his resentencing, the court either 1) stay the proceedings on the first Section 2255 motion; or 2) dismiss the first Section 2255 motion with leave to refile as an initial Section 2255 motion at a later time. *Id.* at 3 n.1.

On April 5, 2001, ten and one-half months before petitioner's direct appeal of his resentencing became final upon this Court's denial of certiorari, the district court denied petitioner's conviction 2255 motion on the merits.

4. Resentencing: On remand from the court of appeals' decision in *Krilich I*, the district court applied the then-current version of Guideline § 2C1.1, which had been substantively

amended on November 1, 1991. See U.S.S.G. App. C, Amend. 367. Whereas the previous version of the Guideline had measured sentencing enhancements for bribery by the defendant's gain (with no mention of loss to the government), the revised provision instructed the court to calculate a defendant's sentence based on "the value of the payment, the benefit received or to be received in return for the payment, *or the loss to the government from the offense*, whichever is greatest." U.S.S.G. § 2C1.1(b)(2)(A) (2003) (emphasis added).

a. The judge orally pronounced petitioner's sentence on February 11, 2000. The district court sentenced petitioner to 87 months' imprisonment. Applying the revised Guideline, the district court based the resentencing not on petitioner's supposed gain but "only on the estimated actual *loss* to the government from lost tax revenue (as opposed to the benefit to [petitioner])." Pet. App. 11a (emphasis added). Although petitioner was not subject to the revised Guideline, which went into effect after the conduct for which he was convicted, Seventh Circuit precedent precluded him from seeking to have the sentence corrected under Fed. R. Crim. P. 35 until the judge entered a written judgment. *United States* v. *Clay*, 37 F.3d 338, 340 (1994).

The district court did not enter a written opinion and judgment until November 2000, over eight months after oral pronouncement of the sentence. Pet. App. 10a, 20a. The court's opinion explained that it entered the 87-month sentence on the ground that petitioner "intended the government to lose" the tax revenue. *Id.* 13a. The court thus rejected petitioner's argument that his sentence should not be enhanced under U.S.S.G. § 2C1.1 because "he received no net benefit" from his conduct. Pet. App. 14a. The court "reluctantly conclude[d]" that petitioner "may be correct" that he received no net benefit, but decided that this argument was "legally irrelevant." *Id.* 15a. "Since [petitioner's] offense conduct was intended to cause the government a $14.2

million loss, that amount will be used for applying" the Sentencing Guidelines. Pet. App. 15a.[1]

Petitioner sought to have the sentence corrected under Fed. R. Crim. P. 35. Specifically, on November 6, 2000, petitioner filed a Rule 35 Motion to Correct Sentence, arguing that his sentence violated the Ex Post Facto Clause because it was based on a Guildeline that looked to loss to the government, which was not a sentencing factor at the time petitioner committed his offense, as opposed to the defendant's gain.

On November 13, 2000, the district court denied the Rule 35 motion but abandoned its reliance on the amended Guideline. Critically, the district court purported to engage in new factfinding. Ignoring its previous recognition that petitioner had received no benefit, the district court asserted that "the *benefit* to" petitioner from his offense conduct "was approximately $14 million." Pet. App. 9a (emphasis added). On that basis, the district court reaffirmed the 87-month sentence under the version of the Guidelines it had employed in imposing the first sentence.

b. Petitioner appealed his sentence, arguing *inter alia* that the sentence was imposed in violation of the Ex Post Facto Clause. Petitioner also contended that the district court had exceeded its authority under Rule 35 in making new factual findings. The government cross-appealed from a downward departure imposed by the district court.

The Seventh Circuit rejected petitioner's argument, concluding that "[t]he district court's finding that the gain was $14 million is supported by the record." *United States* v.

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[1] The court relied on "intended loss" rather than "loss" because the government did not actually lose anything. After the oral pronouncement of sentence but before the entry of a written judgment, the Internal Revenue Service had determined that the interest on the industrial revenue bonds at issue in petitioner's case were not tax free. Pet. App. 11a-12a. Therefore, the government did not lose any tax revenue from petitioner's conduct.

Krilich, 257 F.3d 689, 692 (2001) ("*Krilich II*"). But the court of appeals agreed with the government and again vacated petitioner's sentence, remanding with instructions for the district court to impose a sentence in the range of 135 to 168 months.[2]

The Seventh Circuit's decision was entered on July 16, 2001. This Court denied certiorari on February 25, 2002. 534 U.S. 1163 (2002). It was only at that point that petitioner became entitled to challenge under Section 2255 the district court's reliance on the amended Guideline. He had at a minimum one year– *i.e.*, until February 25, 2003 – to do so.

5. Petitioner's Sentencing 2255 Motion: On March 22, 2002, petitioner filed a Section 2255 motion challenging his second sentence. In the sentencing 2255, petitioner raised both his ex post facto argument and the claim that the district court did not have jurisdiction to make additional factual findings in November 2000 because Rule 35 allows a court to correct sentencing errors only within seven days of the date the sentence is orally imposed (in petitioner's case, seven days from February 11, 2000).

a. The district court, the government, and petitioner *all agreed* that the sentencing 2255 was *not* a "second or successive" petition under 28 U.S.C. 2255. As the government explained, citing the Seventh Circuit's decision in *Dahler* v. *United States*, 259 F.3d 763 (2001), "[The] present motion, although numerically [petitioner's] second, is not a 'second or successive' petition requiring prior appellate approval because he attacks sentences (those from his second and third sentencings) other than the sentence attacked by his prior motion." Government's Response to Defendant's

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[2] On remand, the district court entered a sentence of 135 months. Petitioner appealed, and the Seventh Circuit affirmed. A petition for certiorari from the court of appeals' judgment is currently pending as No. 03-16, *Krilich* v. *United States*.

Motion Pursuant to 28 U.S.C. § 2255 To Correct Sentence at 1-2 (Apr. 10, 2002).

The district court denied petitioner's motion. The court held that the ex post facto argument "has been raised and considered on direct appeal, making it unsuitable as a basis for a § 2255 petition unless [petitioner] can demonstrate changed circumstances." Pet. App. 4a. The court also rejected petitioner's argument that the sentencing had been entered in violation of Rule 35 and thus without jurisdiction. The district court concluded that this claim was procedurally defaulted because petitioner had not asserted it on his direct appeal from the resentencing. See *Norris* v. *United States*, 687 F.2d 899, 900 (CA7 1982).

b. Petitioner sought a certificate of appealability. The court of appeals vacated the judgment of the district court and remanded with instructions to dismiss for want of jurisdiction. Pet. App. 2a. That order is the subject of this petition.

The Seventh Circuit concluded that the "district court should not have entertained" petitioner's motion, because it was "his second collateral attack and therefore required this court's approval under 28 U.S.C. §2255 ¶8." Pet. App. 2a. The court acknowledged its holding in *Dahler* v. *United States*, 259 F.3d 763 (2001), that "resentencing resets the counter for purposes of §2255 ¶8" for a collateral attack on "an issue that first arises at the resentencing." Pet. App. 2a. But it reasoned that the ex post facto argument "has been in the case all along" because it "was raised on [petitioner's] initial appeal to this court [*Krilich I*], and it *was* resolved then." *Id.* Accordingly, the court held that "this collateral attack is [petitioner's] second, which does not have (and could not receive) approval under §2255 ¶8 [which requires authorization from the court of appeals to file a successive 2255 application]." *Id.*[3]

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[3] The court of appeals found it "unclear" "[w]hat significance" petitioner's appeal could have, "given that the second sentence was

Petitioner sought rehearing and rehearing en banc. In its answer, the government *conceded* that the critical component of the court of appeals' reasoning – that the ex post facto argument was required to be included in his initial Section 2255 motion because it "was raised on [petitioner's] initial appeal to this court" – was simply wrong. Once again applying the Seventh Circuit's *Dahler* decision, the government acknowledged that "the claims in defendant's second § 2255 motion [including the ex post facto claim] were 'novel to the [first] resentencing.'" Answer of the United States to Petition for Rehearing and Petition for Rehearing En Banc at 10 (Mar. 21, 2003) (quoting *Dahler*, 259 F.3d at 765).

The government nonetheless defended the judgment. As noted, in the district court, the government acknowledged that petitioner's Section 2255 challenge to the sentence on remand was not a successive petition. But in the court of appeals, it reversed that position. The government argued for the first time in its Answer to the Petition for Rehearing that petitioner's sentencing 2255 motion was "second or successive" because petitioner allegedly "could have amended [the conviction 2255 motion] to include the ex post facto claim." Answer of the United States to Petition for Rehearing and Petition for Rehearing En Banc at 10 (Mar. 21, 2003).

Petitioner requested leave to file a reply brief to point out that the factual premise of the government's answer to the rehearing request – *i.e.*, that petitioner could have amended his conviction 2255 motion to include challenges to his sentencing once the sentence had been imposed – was wrong as well. Petitioner sought to point out that his sentencing claims did not become ripe for collateral attack for "months

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vacated more than a year ago." Pet. App. 2a. The answer is that the component of the second sentence challenged by petitioner's timely appeal – the application of the later version of the bribery Guideline – was left unaltered by petitioner's third sentencing.

after the district court denied petitioner's first § 2255 motion." Petitioner's Reply in Support of the Petition for Rehearing with Suggestion for Rehearing *En Banc* at 1 (leave to file denied). But the court of appeals denied the motion.

c. After the Seventh Circuit denied rehearing and rehearing en banc, this petition followed.[4]

REASONS FOR GRANTING THE WRIT

I. The Court Of Appeals Erred In Holding That Petitioner's Section 2255 Motion Was A Prohibited "Second Or Successive" Habeas Application.

Petitioner's sentencing 2255 was not a successive application for the reason given by the court of appeals: Petitioner *could not* have included his sentencing claims in the conviction 2255. Nor was it a successive application for the alternative reason advanced for the first time by the government in opposing rehearing: Those sentencing claims could not be included in any amendment to the conviction 2255 until petitioner's direct appeal of his resentencing concluded with this Court's denial of certiorari on February 25, 2002. By that time, proceedings in the district court on the conviction 2255 were *long concluded*, for the district court denied the conviction 2255 on April 25, 2001. The judgment should accordingly be vacated so that the court of appeals can address the remaining issues presented by petitioner's case.

1. Contrary to the holding of the court of appeals, petitioner's sentencing 2255 motion was not "second or successive" under 28 U.S.C. 2255 ¶ 8. Every court of appeals to consider the question, including the Seventh, has held that

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[4] The court held that petitioner's sentencing 2255 was a successive habeas application and was prohibited for failure to satisfy the requirements of 28 U.S.C. 2255 ¶ 8. Petitioner seeks review of that order, as well as the court of appeals' disposition of his request for a COA.

"a second habeas petition attacking for the first time the constitutionality of a newly imposed sentence is not a second or successive petition." *Walker* v. *Roth*, 133 F.3d 454, 455 (CA7 1997). See also *United States* v. *Barrett*, 178 F.3d 34, 44 (CA1 1999), cert. denied, 528 U.S. 1176 (2000); *In re Taylor*, 171 F.3d 185, 187-88 (CA4 1999); *Esposito* v. *United States*, 135 F.3d 111, 113-14 (CA2 1997); *In re Hill*, 113 F.3d 181 (CA11 1997). A collateral attack raising "challenges to events that are novel to the resentencing" (*Dahler* v. *United States*, 259 F.3d 763, 765 (CA7 2001)) is not "second or successive" under Section 2255, even if the defendant has already filed a collateral attack challenging his conviction. See *id.* (collecting cases). The courts uniformly recognize that such "resentencing collateral attacks" should not be treated as "second or successive" because the claims raised "would not have been cognizable at the time of the earlier petition" (*Barrett*, 178 F.3d at 45 (citation omitted)).

The court of appeals recognized that "resentencing resets the counter for purposes of Section 2255 ¶ 8" if the collateral attack "concerns an issue that first arises at the resentencing." Pet. App. 2a (citing *Dahler*, *supra*). The court concluded, however, that in this case petitioner's ex post facto argument "was raised on [petitioner's] initial appeal to this court," and therefore was "in the case all along," including when petitioner's first 2255 motion was filed. *Id.*

That assertion, on which the court of appeals' decision turned entirely, is wrong. Petitioner could not, and therefore did not, present his ex post facto argument to the court of appeals in his "initial appeal." See *United States* v. *Krilich*, 159 F.3d 1020 (CA7 1998), cert. denied, 528 U.S. 810 (1999). The issue arose only when the district court imposed the *second* sentence in this case. Importantly, the government conceded the error in its answer to the petition for rehearing and petition for rehearing en banc, which explained that the sentencing 2255 motion "related exclusively to alleged errors committed at [petitioner's] second sentencing—namely, the reliance on 'loss to the government' at the sentencing on

February 11, 2000, and the district court's alleged fact-finding when it denied [petitioner's] Rule 35(c) motion on November 13, 2000." Answer of the United States to Petition for Rehearing and Petition for Rehearing En Banc at 8 (Mar. 21, 2003).

Indeed, petitioner anticipated and properly addressed this very timing problem when he filed his conviction 2255 motion. Footnote one of that motion read:

> Mr. Krilich and counsel are mindful that claims made pursuant to 28 U.S.C. 2255 should not normally be split and that a petitioner awaiting resentencing should normally wait until the resentencing judgment has become final before attacking the constitutionality of his underlying conviction. *See Burris v. Parke*, 95 F.3d 465 (7th Cir. 1996). This is, however, an unusual case in which bifurcation of issues relating to the underlying conviction, on the one hand, and issues relating to sentencing and resentencing, on the other hand, would appear unavoidable.
>
> First, Mr. Krilich previously sought certiorari to the United States Supreme Court from the decision of the United States Court of Appeals for the Seventh Circuit affirming his conviction. The Supreme Court denied certiorari on October 4, 1999. If Mr. Krilich were to wait to file his initial motion pursuant to 28 U.S.C. § 2255 until the judgment issued in his resentencing proceedings were to become final, the United States would undoubtedly argue that his petition was too late and that he had waived his right to challenge collaterally the constitutionality of his underlying conviction. Mr. Krilich does not want to risk waiver of his claim that his conviction was obtained in violation of his constitutional rights. Second, Mr. Krilich cannot raise his claims relating to his sentencing, as those proceedings are not yet completed and any constitutional errors that may have

> occurred are not ripe for review. Thus, Mr. Krilich cannot join those issues in this petition.
>
> If this Court determines that Mr. Krilich's challenge to his conviction is premature and should await the issuance of a judgment upon resentencing and/or that judgment becoming final, Mr. Krilich and his counsel request that this Court either stay the proceedings on this motion until that time or dismiss the motion with leave to refile as an initial motion pursuant to [28] U.S.C. 2255 at a later time. In this manner, should this filing be deemed premature, Mr. Krilich will not be prevented from seeking appropriate post-conviction relief by the bar against second and successive Section 2255 motions set by the Anti-Terrorism and Effective Death Penalty Act of 1996.

Motion Pursuant to 28 U.S.C. § 2255 To Vacate, Set Aside and Correct Sentence at 2 n.1 (Oct. 3, 2000).

The district court neither stayed the proceedings nor dismissed the motion with leave to refile. Thus, at the time petitioner filed his sentencing 2255 motion, the court, the government, and petitioner all agreed that the motion was not second or successive. That understanding was correct. See *Dahler*, 259 F.3d at 765. The Seventh Circuit reached the contrary conclusion based on a fundamental misunderstanding of the procedural history of this case that all the parties had pointed out.

2. The alternative defense of the court of appeals' judgment offered by the government in its response to petitioner's rehearing request below fares no better. The government argued for the first time that petitioner's sentencing 2255 motion was a successive application because he should have amended his conviction 2255 motion. The government thus reversed the position it had taken in the district court. There, it had conceded that the sentencing 2255 was "not a 'second or successive' petition requiring prior appellate approval because [the sentencing 2255] attacks

sentences (those from his second and third sentencings) other than the sentence attacked by his prior motion." Response 2 (citing *Dahler*, *supra*).

The government's revised position is wrong. Petitioner could have amended the conviction 2255 motion only before the date on which the district court denied that motion - *i.e.*, April 5, 2001, or at the very latest before the date that court denied a certificate of appealability – *i.e.*, July 11, 2001. But petitioner *could not* seek 2255 relief from the second sentence until this Court denied certiorari on direct appeal of the second sentence *eleven months later* on February 25, 2002. "It is a well-established, longstanding rule that a district court may not ordinarily consider a Section 2255 motion while direct review is still pending." Brief for the United States, *Clay* v. *United States*, 123 S. Ct. 1072 (2003), at 22 (No. 01-1500). See *Kapral* v. *United States*, 166 F.3d 565, 572 (CA3 1999) (collecting cases); see also Rule 5, Rules Governing Section 2255 Proceedings, Advisory Committee Note (1997) (Section 2255 motion "is inappropriate if the movant is simultaneously appealing the decision."). And petitioner was not even required to file his sentencing 2255 motion until February 25, 2003. See 28 U.S.C. 2255 ¶ 6.

3. Petitioner accordingly respectfully requests that this Court grant the petition and remand the case to the Seventh Circuit for consideration of petitioner's remaining legal arguments, which were not considered by the court of appeals in the first instance. Petitioner notes that the Court may find it appropriate to remand for further consideration in light of *Clay* v. *United States*, 123 S. Ct. 1072 (decided March 4, 2003). In *Clay*, which was decided several months after the Seventh Circuit's ruling in this case, this Court for the first time specified that the time to file a Section 2255 motion begins to run after this Court denies certiorari on direct appeal. *Id.* at 1077 n.4. A remand for further consideration in light of *Clay*, combined with the government's recognition in this Court that petitioner was not obliged (indeed, was not permitted) to amend his conviction 2255 in the circumstances

of this case, would permit the Seventh Circuit to correct its error and resolve the remaining issues presented by petitioner's case.

* * * *

This Court's practice has been to resolve only questions actually decided by the court of appeals, leaving additional issues for consideration in the first instance on remand. See *Rose* v. *Clark*, 478 U.S. 570, 583 (1986); *Wood* v. *Strickland*, 420 U.S. 308, 327 (1975). Further, "[t]he possibility that the court of appeals might arrive at the same judgment after a remand is not a reason for this Court to decline to resolve" a case. Cert. Reply of the United States as Amicus Curiae, *Yates* v. *Hendon*, No. 02-458, at 20 n.7. But should the Court decide to grant certiorari to address the remaining issues in the case, it should direct the parties to brief the following two issues, both of which present important circuit conflicts:

- Does Rule 35's seven-day time limit for correcting a sentence for "arithmetical, technical, or other clear error" run from the date the sentence was orally pronounced (as the Second, Fourth, Fifth, Ninth, Tenth, and Eleventh Circuits hold) or from the date the judgment was entered (as the First and Seventh Circuits hold)?
- Is a jurisdictional challenge to a defendant's Section 2255 sentence procedurally defaulted if not raised on direct appeal?

II. The District Court's Ruling That It Had Jurisdiction To Make New Factual Findings Regarding Petitioner's Sentence Nine Months After The Sentence Was Orally Imposed Under Fed. R. Crim. P. 35 Conflicts With The Views Of Other Circuits And Is Incorrect.

Certiorari could be granted in this case to resolve an important and recurring question of federal sentencing law on which the courts of appeals are irreconcilably divided: Does

Rule 35's seven-day time limit for correcting a sentence for "arithmetical, technical, or other clear error" run from the date the sentence was orally pronounced (as the Second, Fourth, Fifth, Ninth, Tenth, and Eleventh Circuits hold) or from the date the judgment was entered (as the First and Seventh Circuits hold)? This question affects the jurisdiction of the district court to correct sentencing errors in every federal criminal proceeding, and the Seventh Circuit has declined to reconsider its position in light of the split. Certiorari would be warranted to resolve the conflict.

Rule 35 provides that "[w]ithin 7 days after sentencing, the court may correct a sentence that resulted from arithmetical, technical, or other clear error." Fed. R. Crim. P. 35(a).[5] The Seventh Circuit holds that under Rule 35 a district court may correct a sentence within seven days of the "date judgment enters rather than the date sentence is orally pronounced." *United States* v. *Clay*, 37 F.3d 338, 340 (1994). The Seventh Circuit reasons that this interpretation of the term "sentencing" is most consistent with Federal Rule of Appellate Procedure 4(b), which runs the time for filing an appeal from the date judgment is entered in the docket. *United States* v. *De La Torre*, 327 F.3d 605, 609 (2003). Thus, under Seventh Circuit precedent, the district court had jurisdiction to make new factual findings regarding petitioner's sentence more than nine months after the sentence was orally imposed pursuant to Rule 35.

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[5] Rule 35 was amended in 2002 "as part of the general restyling of the Criminal Rules." Fed. R. Crim. P. 35 Advisory Comm. Notes. At the time petitioner was sentenced, the rule governing the time limit for correcting a sentence was Rule 35(c), which read, "The court, acting within 7 days after the imposition of sentence, may correct a sentence that was imposed as a result of arithmetical, technical, or other clear error." As the Advisory Committee Notes to the 2002 Amendment explicitly states, "No change in practice is intended by" this change in language.

The First Circuit agrees in dictum. *United States* v. *Morillo*, 8 F.3d 864, 869 n.8 (1993); see also *United States* v. *Fahm*, 13 F.3d 447, 453 (1994). Every other circuit to consider the question, however, has reached the contrary conclusion. See *De La Torre*, 327 F.3d at 609 n.3 (noting split). In *United States* v. *Townsend*, 33 F.3d 1230 (1994), the Tenth Circuit held that "sentence is imposed upon a criminal defendant" for purposes of Rule 35 "when the court orally pronounces sentence from the bench," rather than the date the judgment enters, *id.* at 1231. The court noted that this interpretation is most consistent with the "well established" rule that "a sentence orally imposed governs a conflicting, later-written sentence of the court." *Id.* This rule is "grounded in the Sixth Amendment," which "requires that a defendant be physically present at sentencing." *Id.* Thus, the court concluded, Congress could not have meant the term "imposition of sentence" to refer to the official entry of a judgment of conviction, at which "only members of the clerk's office are present." *Id.*

The Tenth Circuit's holding was subsequently adopted by the Second Circuit in *United States* v. *Abreu-Cabrera*, 64 F.3d 67 (1995). The *Abreu-Cabrera* court noted the conflict between the Seventh and Tenth Circuits and concluded that the Tenth Circuit's interpretation "best effectuates the intent of the rule's drafters—finality in sentencing." *Id.* at 74. The Seventh Circuit's rule "would allow district courts to announce a sentence, delay the ministerial task of formal entry, have a change of heart, and alter the sentence," a sequence of events the Second Circuit believed to be "beyond what the rule was meant to allow." *Id.*

Two years later, the Fourth Circuit joined the Second and Tenth Circuits in *United States* v. *Layman*, 116 F.3d 105, 108 (1997), cert. denied, 522 U.S. 1107 (1998). The court in *Layman* rejected the Seventh Circuit's holding in *Clay* (*id.*), accepting instead both the Tenth Circuit's Sixth Amendment argument and the Second Circuit's reasoning that its interpretation "better promotes the goal of finality in

sentencing." *Id.* at 108-09 (citing *Abreu-Cabrera*, 64 F.3d at 74; *Clay*, 37 F.3d at 340; *Townsend*, 33 F.3d at 1231). Subsequently, the Fifth, Ninth, and Eleventh Circuits adopted this position as well. *United States* v. *Aguirre*, 214 F.3d 1122, 1125-26 (CA9), cert. denied, 531 U.S. 970 (2000); *United States* v. *Morrison*, 204 F.3d 1091, 1093 (CA11 2000); *United States* v. *Gonzalez*, 163 F.3d 255, 264 (CA5 1998).

Importantly, the federal government has expressed its agreement with the holding of the Second, Fourth, Fifth, Ninth, Tenth, and Eleventh Circuits on which petitioner relies. See *De La Torre*, 327 F.3d at 608 n.3 (rejecting the government's argument that "the seven-day window [of Rule 35] begins to run on the date the sentence was orally imposed"); *United States* v. *Wisch*, 275 F.3d 620, 626 (CA7 2001) (similar); *Layman*, 116 F.3d at 108 ("The Government argues that sentence was imposed on Layman when the district court orally pronounced it during the May 17 hearing.").

The conflict over the proper interpretation of Rule 35 was outcome-determinative in this case. Because under the majority rule the district court was without jurisdiction under Rule 35 to make new factual findings regarding petitioner's sentence nine months after it was orally imposed, petitioner's sentence was made under the court's original factual findings in violation of the Ex Post Facto Clause.

The district court sentenced petitioner to 87 months' imprisonment based on the testimony of the government's expert witness regarding the loss to the government resulting from petitioner's conduct. "Crediting and relying only on" testimony related to "the estimated actual loss to the government from lost tax revenue (as opposed to the benefit to [petitioner])," the court "announced [petitioner's] sentence" on February 11, 2000 and entered its judgment on November 1, 2000. Pet. App. 11a. Over nine months after the district court orally imposed petitioner's sentence, it made

the new factual finding (acting on its authority under Rule 35) that "the benefit to" petitioner of his offense conduct "was approximately $14 million." *Id.* 9a.

On appeal, petitioner argued that his sentence violated the Ex Post Facto Clause, since "loss to the government" was not added as a ground for enhancement under the Sentencing Guidelines until November 1, 1991, after petitioner's offenses occurred. The court of appeals rejected this argument based on the district court's factual finding in November 2000 that "the gain [to petitioner] was $14 million." 257 F.3d 689, 692 (2001). Under the rule of the Second, Fourth, Fifth, Ninth, Tenth, and Eleventh Circuits, however, petitioner's sentence could not have been based on his gain or benefit, because the district court was without jurisdiction to correct petitioner's sentence under Rule 35 nine months after the sentence was orally imposed. Thus, under the majority rule, petitioner's sentence would have to have been based on the district court's original findings of actual or intended loss to the government, in violation of the Ex Post Facto Clause.

On remand in this case, petitioner will invite the Seventh Circuit to reconsider its construction of Rule 35 en banc. Alternatively, this Court's intervention would be warranted at this time.

III. The District Court's Decision That A Jurisdictional Argument Is Subject To The Rules Of Procedural Default Conflicts With The Views Of Other Circuits And Is Incorrect.

The district court concluded that petitioner procedurally defaulted his argument that the sentencing court lacked jurisdiction to make new factual findings in November 2000. (As noted, the court of appeals did not accept this conclusion on petitioner's appeal; rather than affirming, the court of appeals *vacated* the district court's order.) The district court relied on the fact that petitioner had not asserted on direct appeal from the second sentence that the district court lacked authority under Fed. R. Crim. P. 35 to enter its order. The

district court's ruling was incorrect because petitioner's argument goes to the subject-matter jurisdiction of the sentencing court and therefore cannot be procedurally defaulted. In any event, the district court decision is in conflict with the Eleventh Circuit's view that any jurisdiction argument, not only a subject-matter jurisdiction argument, cannot be procedurally defaulted.

The district court's finding of default rested on the Seventh Circuit's decision in *United States* v. *Ceballos*, 302 F.3d 679 (2002), cert. denied, 123 S. Ct. 925 (2003). The Seventh Circuit's position is that rules governing "a court's authority to issue a specific type of remedy" or a court's "power to impose penalties after substantive violations have occurred" (*id. at* 692) should not be characterized as "jurisdictional" and therefore arguments based on such rules are subject to procedural default. Thus, in *Ceballos*, the court concluded that 21 U.S.C. 851(a)(1), which requires the government to inform the court and defense counsel "before trial" of information related to a defendant's prior convictions that it intends to present at sentencing, is not a "jurisdictional" requirement. 302 F.3d at 692. The court reasoned that "the district court clearly had subject-matter jurisdiction over" the defendant's "prosecution pursuant to 18 U.S.C. 3231," and "once subject-matter jurisdiction has properly attached," a Section 851(a)(1) error does not result in "loss of jurisdiction." *Id.* at 691 (internal quotation marks omitted).

The First and Eighth Circuits agree with the Seventh Circuit's view that only claims based on a lack of subject-matter jurisdiction are excused from the requirements of procedural default. Thus, in *Prou* v. *United States*, 199 F.3d 37 (1999), the First Circuit held that a Section 851(a)(1) error not raised on direct appeal could not be brought on collateral attack. The court acknowledged that "jurisdictional failings are immune from normal rules of waiver and procedural default" (*id.* at 42), but concluded that this rule applies only to failings of subject-matter jurisdiction: "Once subject-matter jurisdiction has properly attached, courts may exceed their

authority or otherwise err without loss of jurisdiction." *Id.* at 45. And in *United States* v. *Mooring*, 287 F.3d 725, cert. denied, 123 S. Ct. 259 (2002), the Eighth Circuit concluded that because a Section 851(a)(1) error does not affect a court's subject-matter jurisdiction, the error may not be "raised on collateral review without being subjected to procedural default analysis." *Id.* at 727-28 (citing *Prou*, 199 F.3d at 45). Thus, in the First, Seventh, and Eighth Circuits, only a claim that challenges the court's *subject-matter* jurisdiction is exempt from procedural default. Jurisdictional challenges based on rules that affect "district courts' power to impose penalties after substantive violations have occurred" or "a court's authority to issue a specific type of remedy" (*Ceballos*, 302 F.3d at 692), are subject to the usual requirements of procedural default.

The Eleventh Circuit disagrees. In *Harris* v. *United States*, 149 F.3d 1304 (1998), the court held that a Section 851(a)(1) violation is a "jurisdictional defect" that "cannot be procedurally defaulted." *Id.* at 1308-09. The Eleventh Circuit reasoned that a federal court, as a court of "limited jurisdiction," cannot "derive power to act from the actions of the parties," and therefore "parties are incapable of conferring upon" the court a "jurisdictional foundation we otherwise lack simply by waiver or procedural default." *Id.* at 1308. Thus, on the Eleventh Circuit's view, *any* "jurisdictional defect," not only one that goes to subject-matter jurisdiction, cannot be procedurally defaulted. Rule 35, like Section 851(a)(1), governs a court's "authority to issue a specific type of remedy" or "power to impose penalties after substantive violations have occurred" (*Ceballos*, 302 F.3d at 692), and therefore claims based on Rule 35 would not be held procedurally defaulted in the Eleventh Circuit.[6]

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[6] Two other courts of appeals, the Sixth and Tenth, have characterized Section 851(a)(1) as a "jurisdictional requirement," although they have not specifically addressed the question whether procedural default applies to Section 851(a)(1) claims. *United*

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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August 19, 2003

States v. *Hill*, 142 F.3d 305, 312 (CA6), cert. denied, 525 U.S. 898 (1998); *United States* v. *Wright*, 932 F.2d 868, 882 (CA10 1991).

ROBERT R. KRILICH, SR.,
Petitioner-Appellant,
v.
UNITED STATES OF AMERICA,
Respondent-Appellee.

No. 02-3161

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

December 6, 2002*, Submitted
December 31, 2002, Decided

* This appeal has been submitted under Operating Procedure 6(b) to the panel that decided prior appeals in the case. The panel has concluded that additional oral argument is unnecessary.

COUNSEL: For ROBERT R. KRILICH, SR., Petitioner-Appellant: Stanley L. Hill, HILL & ASSOCIATES, Chicago, IL USA. For UNITED STATES OF AMERICA, Respondent-Appellee: Patrick J. King, Jr., OFFICE OF THE UNITED STATES ATTORNEY, Chicago, IL USA.

JUDGES: Before Hon. FRANK H. EASTERBROOK, Circuit Judge, Hon. KENNETH F. RIPPLE, Circuit Judge, Hon. TERENCE T. EVANS, Circuit Judge.

ORDER

Robert Krilich has been sentenced three times following his criminal convictions for bank fraud and operating an enterprise through a pattern of racketeering. The convictions have been affirmed, but the first two sentences were vacated, *see* 159 F.3d 1020 (1998), and 257 F.3d 689 (2001); the third is affirmed by an order issued today. Krilich sought collateral

review of the first sentence. That petition was denied by the district court, and we declined to issue a certificate of appealability. Now we have Krilich's collateral attack on his second sentence. What significance this could have is unclear, given that the second sentence was vacated more than a year ago. But the district court denied this petition on the merits, and Krilich seeks a certificate of appealability.

The district court should not have entertained Krilich's request. It is his second collateral attack and therefore required this court's approval under 28 U.S.C. § 2255 ¶ 8. Krilich did not seek permission to file, and the argument he presents--that the court violated the Constitution's Ex Post Facto Clause by considering, when imposing sentence, the loss inflicted by his offenses--does not meet the statutory criteria for a second or successive collateral attack. Krilich's lawyers may believe that § 2255 ¶ 8 does not apply because he has been sentenced more than once. But we held in *Dahler v. United States*, 259 F.3d 763 (7th Cir. 2001), that resentencing resets the counter for purposes of § 2255 ¶ 8 only if the collateral attack concerns an issue that first arises at the resentencing. Krilich's argument, by contrast, has been in the case all along. His application for a certificate of appealability opens by saying that "this is the eighth time the petitioner has attempted to have his ex post facto constitutional claim addressed by a federal court." It was raised on Krilich's initial appeal to this court, and it *was* resolved then. We did not discuss it, but we considered all arguments presented, and a court of appeals is not obliged to discuss weak contentions. So this collateral attack is Krilich's second, which does not have (and could not receive) approval under § 2255 ¶ 8.

The judgment of the district court is vacated, and the matter is remanded with instructions to dismiss for want of jurisdiction. See *Nunez v. United States*, 96 F.3d 990 (7th Cir. 1996).

UNITED STATES OF AMERICA

v.

ROBERT KRILICH (94 CR 419).

No. 00 C 6078

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JUDGMENT IN A CIVIL CASE

Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS HEREBY ORDERED AND ADJUDGED that Krilich's § 2255 motion to vacate, modify, or correct his sentence is denied. Defendant to take nothing. All matters in controversy having been resolved, final judgment is hereby entered in favor the United States of America and against Robert Krilich.

Michael W. Dobbins, Clerk of Court

/s/

Stephen C. Tokoph, Deputy Clerk

Date: Jun 4, 2002

ORDER

This matter is before the court on Petitioner Robert Krilich's motion to vacate, modify, or correct his sentence pursuant to 28 U.S.C. § 2255. For the reasons set forth below, the motion is denied.

This case has a long and tortuous history. Krilich has been sentenced on three separate occasions for his September 1995 conviction for racketeering and other related offenses. He has filed four appeals, the last of which is still pending,

and his is his second go-round before this court on a § 2255 petition. The first, which we decided on April 2001, focused on his first sentencing. He now seeks to challenge the second and third sentencing on three grounds: the sentencing judge had no jurisdiction to make certain findings in ruling on a posttrial motion; the amount of forfeiture imposed upon him; and a claim that the sentencing guideline applied to his offense was not in effect when his crimes were committed, making its use a violation of the ex post facto clause of the Constitution.

Krilich raised his ex post facto argument in his second appellate brief but contests that the Seventh Circuit did not address the issue in its opinion. The text of the opinion does not directly examine whether the application of the sentencing guideline was constitutionally impermissible. Instead, the court of appeals noted that Krilich launched several different attacks on his sentence and dealt with the only one they felt needed further analysis: the calculation of his gain. *United States v. Krilich*, 257 F.3d 689, 69192 (7th Cir. 2001). The overall impression of this passage is that the court concluded that the other challenges did not hold sufficient merit to warrant discussion. In other words, the issue has been raised and considered on direct appeal, making it unsuitable as a basis for a § 2255 petition unless Krilich can demonstrate changed circumstances. *Norris v. United States*, 687 F.2d 899, 900 (7th Cir. 1982).

Even assuming that the Seventh Circuit did not consider his ex post facto claim, we independently conclude that it is without merit. The guideline in effect at the time Krilich committed his offenses does not use the exact phrase "loss to the government" that was added to later versions. *Compare* U.S.S.G. § 2C1.1 (a)(2)(A) (2001) *with* U.S.S.G. § 2C1.1(a)(2)(A) (1990). Instead, the older section refers to value, benefit, or benefit to be received from the illegal activity. Krilich cannot argue that his activities would have only resulted in a loss to the government without conferring a commensurate benefit to him or intended to be received by

him, placing him solidly within this section of the guidelines and leading to the table the sentencing judge used to compute the offence level increased based on the amount of the loss effected by the defendant's actions. U.S.S.G. § 2F1.1 (1990). Although the former wording of the guideline is not as specific as the current version, it is clear that Krilich was within the ambit of the previous guideline's substance, and the textual changes do not implicate ex post facto protections.

The remaining grounds Krilich brings up are not based in the Constitution, and he did not raise them during his direct appeal. This failure precludes their resolution by this court. *Bontkowski v. United States*, 850 F.2d 306, 313 (7th Cir. 1988). Finally, we acknowledge the last-ditch effort in Krilich's reply to raise an ineffective assistance of counsel claim only to note its frivolousness; because the application of the earlier guideline does not violate Krilich's constitutional rights, counsel was under no obligation to alert him of the different working of the two guidelines.

Based on the foregoing, Krilich's § 2255 motion to vacate, modify, or correct his sentence is denied.

/s/
Charles P. Kocoras
U.S. District Judge

Dated: Jun 4, 2002

ROBERT R. KRILICH, SR.,
Petitioner-Appellant,
v.
UNITED STATES OF AMERICA.
Respondent-Appellee.

No. 02-3161

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

April 21, 2003, Decided

COUNSEL: For Robert R. Krilich, Sr., Petitioner-Appellant: Stanley L. Hill, HILL & ASSOCIATES, Chicago, IL USA. For United States of America, Respondent-Appellee: Patrick J. King, Jr., OFFICE OF THE UNITED STATES ATTORNEY, Chicago, IL USA.

JUDGES: Hon. FRANK H. EASTERBROOK, Circuit Judge, Hon. KENNETH F. RIPPLE, Circuit Judge, Hon. TERENCE T. EVANS, Circuit Judge.

ORDER

Petitioner-appellant filed a petition for rehearing and rehearing en banc on February 14, 2003. No judge in regular active service has requested a vote on the petition for rehearing en banc,* and all of the judges on the panel have voted to deny rehearing. The petition for rehearing is therefore DENIED.

* Chief Judge Flaum and Judge Williams did not participate in the consideration of this matter.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

United States of America,	)
	)
	)
v.	) No. 94 CR 419
	)
	) HONORABLE
Robert S. Krilich, Sr.	) DAVID H. COAR
	)
	)

MEMORANDUM OPINION & ORDER

On November 1, 2000, this Court sentenced defendant Robert Krilich to eighty-seven months confinement in a federal prison and issued a statement of reasons for that order. Krilich now moves under Federal Rule of Criminal Procedure 35(c), to correct or reduce his sentence. For the reasons stated below, this motion is DENIED.

Background

Krilich was convicted of fourteen counts of fraud under 18 U.S.C. § 1014, and conspiracy to violate the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1962(d). On June 23, 1997, Judge Grady sentenced Krilich to sixty-four months in prison. Krilich appealed both his conviction and his sentence and the United States cross-appealed his sentence. On October 27, 1998, the United States Court of Appeals for the Seventh Circuit affirmed Krilich's convictions but vacated Judge Grady's sentencing order and remanded the case for re-sentencing. On October 8, 1999, Krilich's case was reassigned to his Court pursuant to Local General Rule 2.30F.

This Court originally stated that it would rely on the actual loss to the government as the basis for Krilich's sentence on remand, as the Court of Appeals for the Seventh Circuit has directed in *United States v. Krilich.* 159 F.3d 1020, 1031 (7th Cir. 1998). Before this Court issued its written statement of reasons, the Internal Revenue Service issued an adverse determination with respect to the bonds at issue in this case. The IRS found that the interest on the bonds was not tax free as originally intended. Krilich subsequently moved to set aside this Court's oral ruling regarding tax loss. In the November 1, 2000, memorandum opinion, this Court relied primarily on the "intended loss" to the government as the basis for Krilich's sentence. Now, Krilich argues that the relevant guideline – the one that was in place when Krilich committed his crime – does not permit this Court to consider the loss to the government as a basis for enhancing the base offense level.

Analysis

Krilich's motion is denied because the benefit to him, like the intended loss to the government, is also greater than $410 million. In this motion, even Krilich acknowledges that the benefit to him is a basis for enhancing his sentence. The Seventh Circuit recognizes in its opinion that there is a correlation between Krilich's gain and the government's loss, albeit not an exact correlation. *See Krilich*, 159 F.3d at 1031. Of more significance here, though, is the testimony of David Joseph Ross, who is the government finance expert. As noted in this court's previous opinion. Ross testified that:

> both the benefit that Krilich would have received from being able to borrow at a tax-free interest rate and the loss that the United States Treasury would have suffered had Krilich been able to borrow at a tax-free interest rate . . . would be about $14.2 million.

Mem. Opinion, Nov. 1, 2002, at 2.[1] In response to Krilich's objections to Ross's opinion, this Court also noted that "Krilich d[id] not offer a single "fact'" to rebut that opinion. *Id.* at 5. Krilich has not presented this Court with anything that would alter that original conclusion. Krilich makes too much of the fact that in the original memorandum opinion, this Court "reluctantly conclude[d] that Krilich may be correct "that he ultimately lost money on the project." As noted in footnote four of that opinion, this Court doubted the propriety of many of the so-called "deductions" that Krilich used to conclude that he had actually suffered a loss. At the bottom, Ross's testimony provides a more substantial basis for determining the benefit and persuades this Court that the benefit to Krilich was approximately $14 million. In view of Ross's factually uncontradicted opinion, this Court again concludes that the benefit to Krilich exceeds $10 million and that on the basis of either the benefit to him or the intended loss to the government, the sentence enhancement remains the same.

CONCLUSION

For the foregoing reasons, Krilich's motion is DENIED.

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[1] Ross actually estimated the benefit to Krilich as $14.6 million. See Tr. of Proceedings, January 28, 2000, at 23.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

United States of America,	)
	)
	)
v.	) No. 94 CR 419
	)
	) HONORABLE
Robert S. Krilich, Sr.	) DAVID H. COAR
	)
	)

MEMORANDUM OPINION

Defendant Robert S. Krilich, Sr. is before this Court for sentencing. For the reasons stated below, this Court sentences Krilich and commits his to the Bureau of Prisons for a term of 87 months to be followed by three years supervised release.

Background

Krilich was convicted of fourteen counts of fraud under 18 U.S.C. § 1014, and conspiracy to violate the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1962(d). On June 23, 1997, Judge Grady sentenced Krilich to sixty-four months in prison. Krilich appealed both his conviction and his sentence and the United States cross-appealed his sentence. On October 27, 1998, the United States Court of Appeals for the Seventh Circuit affirmed Krilich's convictions but vacated Judge Grady's sentencing order and remanded the case for re-sentencing. On October 8, 1999, Krilich's case was reassigned to his Court pursuant to Local General Rule 2.30F.

According to the Seventh Circuit, this Court was to consider on remand the revenue that Krilich's bribery scheme[1] caused the Internal Revenue Service to lose. *See United States v. Krilich*, 159 F.3d 1020, 1031 (7th Cir. 1999) ("the existence of a substantial tax loss is undeniable"). Additionally, the Seventh Circuit stated that this Court "should give no weight to. . .the disparity between Krilich's presumptive sentence under § 2F1.1 and [the bribee,] Mayor Sarallo's actual sentence." *Id.* at 1031. Beginning on January 28, 2000, this Court heard expert testimony to undertake calculation of the tax loss to the government, despite the Seventh Circuit's implication that a precise calculation would be difficult. *Id.* ("[c]alculating the actual loss in tax revenues from providing investors with a tax shield that the law does not allow is quite complex . . . .")

The government presented testimony from David Joseph Ross, who is senior vice president of a consulting firm specializing in economic analysis of a variety of legal and regulatory matters. Ross calculated both the benefit that Krilich would have received from being able to borrow at a tax-free rate and the loss that the United States Treasury would have suffered had Krilich been able to borrow at a tax-free interest rate. Assuming that the bonds were tax-free, Ross concluded that both the benefit to Krilich and the loss to the government would be about $14.2 million. Crediting and relying only on the estimated actual loss to the government from lost tax revenue (as opposed to the benefit to Krilich), this Court announced Krilich's sentence and indicated that a written order would be forthcoming.

Before this Court issued its written statement of reasons, the Internal Revenue Service issued an adverse determination with respect to the bonds at issue in this case. The IRS found that the interest on the bonds was not tax free as originally

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[1] Bribery was one of the predicated acts for Krilich's RICO conspiracy conviction.

intended. Krilich subsequently moved to set aside this Court's oral ruling regarding tax loss. According to Krilich, since the IRS determined that the bond interest was taxable, the underlying premise for his sentence enhancement – a tax loss of $14.2 million – ceased to exist. Krilich filed a memorandum in support of his motion to which the government filed a response and to which Krilich, in turn, filed a reply. For the reason stated, below, this Court's initial determination of Krilich's sentence remains the same, albeit for slightly different reasons.

Analysis

"Because the underlying conduct for [Krilich's] RICO conviction was bribery, the relevant [sentencing] guideline is § 2C1.1(b)(2)(A)." *Krilich*, 159 F.3d at 1029. That section provides that "if the value of . . . the loss to the government from the offense. . . exceed[s] $2,000, [the offense level will] increase by the corresponding number of levels from the table in § 2F1.1" U.S. Sentencing Guideline Manual § 2C1.1 (b)(2)(A). The table set forth in Section 2F1.1 varies the sentencing range. . . depending on the amount of loss." United States v. Lauer, 148 F.3d 766, 767 (7th Cir. 1998). A loss greater than $10,000,000, increases the offense level by fifteen levels. *See* U.S. Sentencing Guideline Manual § 2F1.1 (b)(1)(P). The loss mentioned in Section 2F1.1 can be either an actual loss or an intended loss, whichever is greater. *Id.* (citing § 2F1.1, Application Note 7) (further citations omitted). An intended loss is measured by the amount that the defendant put at risk. *See Lauer*, 148 F.3d at 768. Intended loss is not mitigated by a defendant's hope that the victimized party not actually be harmed. *See id.*

Loss to the Government

To calculate the actual loss to the government, the government's expert collected data and compared interest rates on tax-free debt instruments and taxable debt instruments that were otherwise equivalent. The data indicated the difference between the rates demanded for

investment in taxable as opposed to tax-free securities. Based on the data, Ross estimated the interest rate that Krilich would have had to pay if he had been unable to obtain tax-free bonds to finance the project.

Because tax-free bonds financed the project, the investors did not pay taxes to the United States Treasury on the interest that they received. Conversely, if the interest on the bonds had not been tax free, the investors would have had to pay taxes on the interest received. Therefore, the United States lost the benefit of the taxes it would have received but for the fact of the improper attempt at tax-free financing. Applying the interest data previously discussed, Ross concluded that between 1986 and 1991, the loss to the government, assuming a 28% marginal tax rate for investors, would have been $16.5 million. Using the average marginal tax rate for all United States taxpayers, the loss would have amounted to $14.2 million. This Court credited Ross's testimony and found that the government suffered a loss of $14.2 million.

As noted above, after this Court's hearing on actual tax loss and after the oral ruling, the IRS determined that the interest on the bonds in question was taxable. In other words, the "actual loss" estimated by the government's expert was no longer an actual loss. The interest on the bonds turned out to be taxable, not tax-free as intended. The absence of an actual loss of $14.2 million, however, does not save the day for Krilich because he intended the government to lose that revenue. In the parlance of the *Lauer* case, Krilich put $14.2 million "at risk" through his bribery scheme. *See Lauer*, 148 F.3d at 768.[2] Even though Krilich's bribery scheme did not result in the issuance of tax-free bonds, he intended to have tax-free bonds issued. Indeed, this was the ultimate goal of Krilich's bribe. At bottom, if things had turned out as Krilich

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[2] Ross's analysis regarding the actual tax-revenue loss to the government is equally valid with respect to intended loss. In hindsight, Ross's calculations just turned out to be hypothetical estimates of what the government would have lost.

had planned, the tax-free bonds would have been issued and the government would be deprived of $14.2 million in tax revenue. This intended loss is no less tied to Krilich's bribery scheme than the actual loss that would have befallen the government.[3]

Krilich counters both the loss and the gain calculations by positioning that the project actually undertaken thought the tax-free financing was not economically feasible at taxable (higher) interest rates. Krilich therefore concludes that Ross' comparisons between taxable financing and tax-free financing is illusory. In support of this theory, Krilich does not offer a single "fact." Instead, he relies on the testimony of Stan Lazar, an expert in real estate accounting (not real estate finance). Lazar opined that Industrial Revenue Bond Financing is used to create incentives for builders to undertake projects that otherwise would not be built. Neither, Krilich or Lazar, however, offered any support for this sweeping statement. This Court is unwilling to conclude that the mere fact that a condition of financing was that 20% of the project be devoted to low income housing renders the project economically unsound. It is at least equally plausible that Internal Revenue Bond financing was obtained (by way of bribe) to increase the profits for an already viable project simply because of greed. It would have been relatively simple for Krilich to reconstruct the financial analysis of the project and compare the projected results of alternative financing to counter Ross' assumptions. Absent other evidence, the Court rejects Krilich's unsupported analysis because Ross' approach is reasonable.

Krilich also argues that he received no net benefit from the proceeds of the financing. Relying on Application Note 2 to Guideline 2C1.1, Krilich argues that where a contract is awarded in return for a bribe, the measure of net benefit is the

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[3] Because the Court determined that Krilich intended that the government lose $14.2 million in revenue, it is not necessary to address the government's waiver argument.

defendant's profit on the contract. Krilich states further that there was no profit on the contract. He asserts that there was a loss. The Court reluctantly concludes that Krilich may be correct on this latter factual point, but notes that it is legally irrelevant.[4] Since Krilich's offense conduct was intended to cause the government a $14.2 million loss, that amount will be used for applying §2F1.1.

The Court finally rejected Krilich's argument that the "intended loss" doctrine is inapplicable in this case. Krilich analogizes to cases involving fraudulent loan applications and fraudulent contract procurement. Such analogies are not applicable here. In fraudulent loan applications and fraudulent contract procurement cases, an exception is made under the intended loss doctrine for fraudfeasors who intend to perform under contract of loan. *See, e.g., United States v. Schneider*, 930 F.2d 555, 558 (7th Cir. 1991). This exception exists because these fraudfeasors do not actually intend to cause a loss to the government equal to the amount of the loan or perform the full value of the contract. *See, e.g., id.* In stark contrast to these cases, Krilich intended to cause the government a tax loss of approximately $14.2 million despite his attempt to and intention to "perform" under the contract obtained as a result of his bribe to Mayor Sarallo. Unlike the loan or contract procurement cases, Krilich's intent throughout was to have tax-free bonds issue to finance his

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[4] This Court's reluctance stems from a lingering doubt as to whether the "contract" obtained in return for the bribe is limited to the tax-free financing or, as he suggests, encompasses the entire building project. Moreover, Krilich's evidence of detriment (offsetting any benefit he enjoyed) includes several questionable items such as: $2.5 million or more for a criminal defense counsel and incarceration-related matters, the $5 million in personal funds for the purchase of the subseries I bonds (without offsetting that amount by the value of the 26 completed townhouses), and allocation of office and maintenance expenses to the Oakbrook Terrace Project.

project. Tax-free bonds would have deprived the government of revenue that could have otherwise been collected by taxing the interest on taxable bonds.

The parties do not dispute that prior to any consideration of departure, Krilich's base offense level is 17. Since the Court determines that Krilich intended the government to suffer a $14.2 million tax loss, the pre-departure base level is increased 15 levels to 32.

Departure Based on Krilich's Medical Conditions

Krilich also moves for downward departure on the basis of his medical and psychological conditions. Dr. Richard Herbert, who is no longer engaged in active practice, testified that Krilich was a patient of his before Krilich's incarceration and that he saw Krilich a number of times before his incarceration. On cross examination, Dr. Herbert acknowledged that he had not been listed as one of Krilich's treating physicians on forms that Krilich executed upon entry into the custody of the Bureau of Prisons. Additionally, Dr. Herbert stated that he treated Krilich several times "to the extent that I had access to him. He. . .came to my office. I offered treatment and I gave him advice what should be done." Tr. Proceedings Feb. 1, 2002 at 283-84. Dr. Herbert had no records of Krilich's visits, and never did a complete history of Krilich. Dr. Herbert has no particular expertise in the field of cardiology, but this did not defer him from expressing numerous opinions about Krilich's heart condition(s) and the care provided, or not provided, by the Bureau of Prisons. This Court gives no weight to Dr. Herbert's testimony.

Dr. Bernard Rubin is a psychiatrist who testified that Krilich is suffering from at least four serious physical infirmities: (1) chronic cardiovascular disease; (2) chronic peripheral vascular disease with hypertension; (3) obstructive pulmonary disease; and (4) back disease of lumbar and lumboscaral origin. According to Dr. Rubin, Krilich also suffers from a major depressive disorder, characterized by

insomnia, anorexia, "distractibility", hopelessness, suicidal thinking and tearfulness. The supplement to the Presentence Investigation Report also sets out the medical conditions that Mr. Krilich suffers from and the medications he is receiving.

Dr. Rubin also opined as to the effect that prison would have on Krilich. Dr. Rubin believes that there are three difficulties with treatment of physical or psychological problems in prison: (1) prisons are organized punishment; (2) they are organized for security; and (3) medical, surgical and psychological concerns are secondary. Therefore, he concludes that Krilich's various conditions can best be addressed outside of an institutional setting.

The Government argues that because many of Krilich ailments are chronic and because he would suffer from them whether or not he was incarcerated, no departure is warranted. The Court disagrees. Krilich's age and the number and complexity of his ailments render him unlike the "typical" defendant who appears in this court for sentencing. While this Court is aware that the mandatory minimum requirements of the Sentencing Guidelines have created an increased need to provide geriatric treatment for inmates, Krilich's health issues present an unusual profile. The conditions of confinement will undoubtedly aggravate his conditions and make treatment more difficult. Therefore, a departure is warranted. The question, therefore, is the level of departure.

Krilich argues for a substantial departure to a level that would require his immediate release on the theory that treatment of his ailments by the Bureau of Prisons has been inadequate. The issue, however, is whether the Bureau of Prisons is incapable of providing medically reasonable treatment to Krilich. While the manner in which he had been treated in the past is some indication of standards within the Bureau of Prisons and therefore somewhat predictive of future treatment, the issue is broader than whether doctors hired by Krilich would have treated his conditions differently.

This Court has no doubt that a person of Krilich's means could obtain first class medical and psychological treatment outside of a prison environment and will assume, without deciding, that the treatment the Krilich could receive outside of prison would be superior to the treatment he is receiving from the Bureau of Prison. The Court cannot, however, conclude that the treatment that Krilich has received and which he is likely to receive in the future from the Bureau of Prison is so lacking in quality that this Court should depart to a level that requires his immediate release, or to a level at which some alternative to imprisonment would be available. Unfortunately, Krilich has approached the question of departure as an all or nothing proposition. The focus of his proofs and arguments has been an all out assault on continued confinement. He has attempted to show that the BOP has not and will not adequately treat his medical and psychological conditions and therefore the court should depart to level that will allow some form of home detention which permit treatment by his personal treaters. In his single-minded thrust to avoid further incarceration, Krilich has neglected to provide the court with information necessary to readily determine an appropriate departure that takes into account his conditions, measured by the particular manner in which they impose upon him hardships outside of the heartland. Moreover, the guidelines themselves provide little textual guidance in determining the extent of downward departure.

§5H1.4 of the Guidelines provides that while physical condition (of a defendant) is not "ordinarily relevant" in determining whether a departure is warranted, "an extraordinary physical impairment may be a reason to impose a sentence below the applicable guideline range." The example contained in the guideline refers to a defendant who is so seriously ill or infirm that "home detention may be as efficient as, and less costly than, imprisonment" There is no questions but that a sentence that would have Krilich pay the cost for treatment of his various ailments would be less costly to the government. It is unclear whether such a sentence

would be more "efficient" than a period of imprisonment. If efficiency in this context refers to the possibility that the Bureau of Prisons lacked the ability to treat the defendant in a BOP facility and would have to transport the defendant to a location with the attendant travel and security costs, then there is no showing that the Krilich's circumstances warrant such an approach. If the term is to be read more expansively, taking into account the broad goals of sentencing (See 18 U.S.C. §3553(a)(2)), it is clear that those goals are not served by departing to a level where Krilich escapes a substantial prison term. Neither his physical condition nor the ends of sentencing are served by such a result. Krilich stands convicted of serious crimes which deserve a serious sanction. The fact that he suffers significant medical ailments serves as a reason to mitigate the punishment, not to eliminate it.

None of Krilich's four major illnesses (cardiovascular disease, peripheral vascular disease with hypertension, obstructive pulmonary disease and back disease/lumbar and lumbosacral origin), taken alone, justify a departure. In combination with each other, they present treatment and quality of life difficulties that fall outside the heartland. The court will therefore depart one level for each of the four conditions and an additional level for the interaction of the ailments.

Departure Based on Sentencing Disparity

Krilich also sought a departure based on the argument that the loss amount overstates the seriousness of his conduct. Intertwined within this argument is Krilich's argument of sentencing disparity. According to Krilich, he was deduced into paying the bribe by Mayor Sarallo's officials who where "on the make." These officials received sentences much less severe than that which is called for under the Guidelines for Krilich. Krilich's argument in this regard is exceptionally misguided. While wise enough not to argue that Judge Grady's earlier ruling is the law of the case, Krilich foolishly argues that this departure determination is "certainly entitled

to great weight." Krilich's argument amazingly ignores Seventh Circuit precedent that could not be more on point – namely, the appellate opinion in this case, expressly reversing the decision that Krilich asks this Court to adopt here. *See United States v. Krilich*, 159 F.3d 1020, 1021-22 (7th Cir. 1998). The Seventh Circuit could not have more clearly precluded such consideration. *Id.* ("on remand the Judge should give no weight to. . .the disparity between Krilich's presumptive sentence under §2F1.1 and mayor Sarallo's actual sentence. . .") In addition, as the Government notes, Krilich has not argued on remand that the Guidelines were misapplied in either his or Sarallo's case. The request to depart further is denied.

Conclusion

For the foregoing reasons, this Court sentences Robert S. Krilich, Sr. and commits him to the Bureau of Prisons for a term of 87 months to be followed by three years supervised release.

DATE: November 1, 2000